IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Writ Petition No.4800 of 2005

Abdul Gani Hussein Mukadam **... Petitioner**

V/s

1. Mustak Mohammad Mukadam
2. Faizal Abdul Gani Mukadam
3. Liyakat Abdul Gani Mukadam
4. Mukund Kanekar **..Respondents**

Shri S.R.Railkar for Petitioner
Shri C.K.Marathe for Respondent no.1
Leena Sawant for Respondent nos.2 to 4

CORAM:S.R.SATHE,J.

DATED:20th Feb. 2006

ORAL JUDGMENT :-

1. The Petitioner, original defendant no.1, has filed this writ petition under Article 227 of Constitution of India, whereby, he has challenged the order passed below Exh.147, in Regular Civil Suit No. 29 of 2001 by which his prayer for impounding the document of partition deed as per provision of Article 46 of Bombay Stamp Act was rejected and the application Exh.147 was dismissed.

2. Brief facts giving rise to this petition are as under:

. One Mustak Mohammed Mukadam, the present Respondent no.1 filed suit simplicitor for injunction restraining the defendants including the present Petitioner from causing interference in his peaceful possession of the suit property. He claimed that the suit property has come to his share by instrument executed in the year 1960. According to him it was the instrument of partition.

3. The defendants including the present Petitioner contended that the alleged instrument of partition is unregistered and as such void and it has not created any right in favour of the plaintiff.

4. The plaintiff led his evidence through PW 1 and in his examination in chief the document in question viz. instrument of partition was held to be proved and as such it was exhibited by the Court as Exh.123. Thereafter, the matter was adjourned for cross examination and when the same was fixed in the next month i.e. on 22-2-2005 the defendant, present Petitioner filed application Exh.147 and contended that instrument of partition is not properly stamped and registered and as such same cannot be accepted in evidence and prayed that the said document be impounded.

5. The said application was strongly opposed by the plaintiff on the ground that objection with regard to insufficient stamp and registration was not taken by the defendant when document was actually shown to PW 1 and it was exhibited. It was therefore, submitted on behalf of the plaintiff that document once admitted in evidence and accepted by the court now cannot be de-exhibited or no objection can be taken for the same by the defendant and as such defendant's application be rejected.

6. From perusal of the order passed by the learned trial Judge below Exh.147, it appears that both the learned Advocates made their submissions on the basis of provisions of Section 34, 35, 36, 37, 38 and 58 and Article 46 of Bombay Stamp Act 1958 as well as on the basis of provisions of Section 17 and 49 of Indian registration Act 1908. Both the learned Advocates cited various authorities in support of their respective submissions. After perusing the said legal provisions and considering the authorities cited by both the learned Advocates the learned trial Judge came to the conclusion that as no objection was taken by the defendants when the document was executed, provisions of Section 35 of Bombay Stamp Act are applicable to the present case and as such instrument Exh.129 is not liable for impounding.

7. Being aggrieved by the above mentioned order, the original defendant no.1 filed the present petition.

8. In this petition before me Shri Railkar, learned Advocate for the Petitioner submitted that the learned trial Judge has wrongly held that provisions of Section 35 of the Bombay Stamp Act are applicable and as a result of the same the document cannot be impounded.

9. In support of his submission he has placed reliance on various authorities such as :

i. M/s Gonwood Agencies Pvt. Ltd. V/s Namdeo Pandurang Panchal and Anr. 2005(1) ALL MR 335

ii. M/s Supreme Music Hyderabad V/s Manilal g. Purohit and Ors. 2005(4) CCC 321 (A.P.)

iii. M/s Deshmukh and Co. (Publishers) Pvt. Ltd. V/s Avinash Vishnu Khandekar and Ors. 2005 Vol. 107(3) Bom. L.R. 679.

iv. Second Appeal No.486 of 1988 Deu Jakhanna Chambhar since deceased by his heirs Anusuya Deu Chambhar and Ors.

10. As against this the learned Advocate for the Respondent-plaintiff supported the judgment passed by the learned Judge and placed reliance on a case **Javer Chand and Ors V/s Pukhraj Surana AIR 1961 SC 1655** wherein it is stated by the Apex Court that unstamped document marked as exhibit in the case and used by parties in examination and cross examination of witnesses, order in admitting document in evidence is not liable to be reviewed or revised. He also relied on a case **Ratanlal Vs Daudas and Anr. AIR 1954 RAJ 173** wherein it is stated that once an instrument has been admitted in evidence, either after judicial determination of the issue relating thereto, where such issue has been raised or because no objection was taken to its admissibility, but not by pure mistake,

such admission cannot be called in question on the ground of insufficiency of stamp.

11. From the perusal of the order passed by the learned trial Judge it appears that the learned trial Judge has in fact not taken into consideration as to what is the exact prayer of the defendant in application Exh.147. If we peruse the said application then we find that there he has made only one prayer and that is to impound the document in question. Though it is stated in the application in the last sentence that such document is insufficiently stamped, the same cannot be used for collateral purpose, no specific relief is sought on that ground. The question of its admissibility, whether it can be used for collateral purpose etc. would arise only at the time of argument of the said case. By virtue of application Exh.147 the defendant had simply asked the Court to get the document impounded from the plaintiff. While considering that question there was no necessity for the court to consider as to whether the objection with regard to the said document was taken at the initial stage or not, what is the effect of not taking objection when the document was actually exhibited, what would be the effect of the objection taken after the document is exhibited, whether the said document can finally be read in evidence or not, if so, for what purpose, etc.

12. It is not in dispute that the plaintiff is relying on the said document Exh.129 as a partition deed or

instrument of partition. It is needless to say that as per the provisions of Bombay Stamp Act and Article 46 of the said Act, such instrument requires stamp. Not only that but it is required to be registered as per the provisions of Section 17 and 49 of Indian Registration Act, 908. So, it is even not the case of the plaintiff that this document does not require stamp. Thus the only point which is to be considered is whether the said document can be impounded when admittedly the same is not properly stamped. While considering this question it is in fact not necessary to refer to the provisions of Sections 34, 35, 36, 37, 38 and 54 of the Bombay Stamp Act. All the authorities cited by both the learned Advocates are relating to above mentioned sections. In my opinion, the relevant provision which is applicable to the facts of the resent case while deciding the application Exh.147 is Section 33 of Bombay Stamp Act. It runs as follows :-

> S.33. Examination and impounding of instrument :- (1) Subject to the provisions of Section 32A every person having by law or consent of parties authority to receive evidence and every person in charge of public office, except an officer of police or any other officer, empowered by law to investigate offences under any law for the time being in force, before whom any instrument chargeable, in his opinion, with

duty, is produced or comes in the performance of his functions shall if it appears to him that such instrument is not duly stamped, impound the same irrespective whether the instrument is or is not valid in law.

2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him in order to ascertain whether it is stamped with a stamp of the value and description required by the law for the time being in force in the State when such instrument was executed or first executed.

Provided that -

a) x x x

b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court may appoint in this behalf.

13. Thus from the above provisions it is very clear that instrument Exh-147 is an instrument of partition. The

same requires necessary stamp as per the Bombay Stamp Act and as such the Court was in fact entitled to give direction for impounding the said instrument. So, the learned trial judge ought to have granted the application and directed the plaintiff to impound the document means to pay deficit stamp as well as pay penalty as per provisions of the Stamp Act. So, I have no hesitation to hold that the learned trial Judge has ered in law by dismissing or rejecting the defendants prayer to give direction for impounding the document. In this view of the matter I pass the following order :-

O R D E R

i. The Petition is allowed.

ii. The order passed by the trial court below Exhibit 147 dismissing the application is set aside.

iii. The partition deed in question be impounded. The Plaintiff to pay the deficit stamp as well as the penalty on the said deed.

(S.R. SATHE, J.)